Supreme Court, U.S.
FILED

No. 96-6148 14 JUN 9 1997

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1996

LORRAINE LODER,

Petitioner,

vs.

CITY OF GLENDALE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

MARVIN E. KRAKOW
Counsel of Record
STEVEN J. KAPLAN
KRAKOW & KAPLAN
1801 Century Park East
Suite 1520
Los Angeles, California 90067
(310) 229-0900

MARK D. ROSENBAUM
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Attorneys for Petitioner
LORRAINE LODER

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

No. 96-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LORRAINE LODER,

Petitioner,

vs.

CITY OF GLENDALE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S CROSS-PETITION FOR WRIT OF CERTIORARI

MARVIN E. KRAKOW
Counsel of Record
STEVEN J. KAPLAN
KRAKOW & KAPLAN
1801 Century Park East
Suite 1520
Los Angeles, California 90067
(310) 229-0900

MARK D. ROSENBAUM
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Attorneys for Petitioner
LORRAINE LODER

PETITIONER'S OPPOSITION BRIEF TO RESPONDENT'S CROSS-PETITION FOR CERTIORARI

I. THE CALIFORNIA SUPREME COURT'S HOLDING THAT GLENDALE'S SUSPICIONLESS PRE-PROMOTIONAL DRUG TESTING VIOLATES THE FOURTH AMENDMENT IS CONSISTENT WITH THE DECISIONS OF THIS COURT IN *TREASURY EMPLOYEES v. VON RAAB* AND *CHANDLER v. MILLER*.

The California Supreme Court considered the application of Fourth Amendment cases to Glendale's drug testing program before addressing state constitutional issues, because this Court had clearly spoken in the area and the California Constitutional provisions had not been specifically applied to workplace drug testing. (Appendix B-25, B-26) In dealing with testing of promotional applicants (the subject of Respondent's Cross-Petition for Certiorari), the California Supreme Court plurality followed *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). It properly held that across the board suspicionless testing of promotional applicants violated the Fourth Amendment. It is clear from this Court's recent holding in *Chandler v. Miller*, No. 96-126 (April 15, 1996) that the city's promotional testing program could not be sustained.

Cross-Petitioner's efforts to characterize the drug testing it does as part of a routine physical exam is not supported by the record. (App. B-87 - B-91) The drug testing program requires disclosure of an array of medical and personal information which are simply not part of a routine physical prior to employment, let alone part of a physical which might be required for promotion.

The California Supreme Court's remedy for the overbreadth of the Fourth Amendment intrusion on current employees was clearly consistent with this Court's teaching in *Chandler v. Miller, supra*, that when the government would engage in suspicionless testing, it must undertake a careful analysis of the factual circumstances of specific jobs. (App. B-51, note 12; B-80 - B-82) The Court properly invalidated the current program as overbroad, while leaving Respondent City of Glendale free to fashion a more limited promotional testing program consistent with the Fourth Amendment.

II. RESPONDENT IMPROPERLY SEEKS REVIEW OF THE STATE COURT'S RESOLUTION OF FACTUAL ISSUES.

Respondent's complaint boils down to an assertion that the California Supreme Court improperly weighed evidence of and resolved factual disputes concerning the drug testing program's intrusion on

current employees and the city's need to test promotional candidates. (Conditional Cross-Petition, 5-7) Ordinarily, such concerns are not the basis for certiorari. Rule 10, Rules of the Supreme Court.

III. THE CALIFORNIA SUPREME COURT'S DECISION RESTS ON INDEPENDENT STATE GROUNDS.

The California Supreme Court plurality based its decision with respect to promotional testing on the Fourth Amendment. It did not explicitly use the California Constitutional right to privacy to invalidate that part of Glendale's drug testing program. However, the plurality also explicitly stated that the state constitutional right to privacy was enacted to provide, and has been consistently interpreted to provide, no less protection than that provided by the Fourth Amendment. (App. B-70, B-71) Justice Mosk's concurring opinion specifically relied on the right to privacy provided by the California state constitution. (App. B-85, B-109 - B-114) Thus, the California Supreme Court's holding with respect to promotional testing can be understood as based on both state and federal constitutional considerations. For that reason alone, it would be imprudent and unnecessary to consider the promotional testing issues raised by Respondent's Cross-Petition.

IV. CONCLUSION

The Conditional Cross-Petition For Certiorari should be denied.

Dated: June 6, 1997

Respectfully submitted,

KRAKOW & KAPLAN
MARVIN E. KRAKOW
STEVEN J. KAPLAN
1801 Century Park East,
Suite 1520
Los Angeles, CA 90067

ACLU OF SOUTHERN
CALIFORNIA
MARK ROSENBAUM
1616 Beverly Blvd.
Los Angeles, CA 90026

Attorneys For Petitioner